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1 JUN 1977

IN THE SUPREME COURT OF THE STATE OF UTAH
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

LAVON RUSSELL,

Plaintiff and
Respondent,

vs.

RAYMOND RUSSELL,

Defendant and
Appellant.

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Case No. 14361

BRIEF OF RESPONDENT

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FILED

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LAVON RUSSELL,

Plaintiff and
Respondent,

vs.

RAYMOND RUSSELL,

Defendant and
Appellant.

Case No. 14361

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Plaintiff, the respondent herein, filed with the Court and served upon the defendant and appellant herein an Order to Show Cause and Affidavit in Re Modification of Decree, which had been previously entered on September 20, 1968. The plaintiff was sworn and offered testimony in support of her petition to modify. The defendant did not offer any testimony or evidence in opposition to the petition.

The response to appellant's Brief herein is based upon the record and transcript in this matter. All references to the record are designated as (R) and all references to the transcript are designated as (T).

STATEMENT OF FACTS

Plaintiff-Respondent and Defendant-Appellant were married in November 1948; six (6) children were born to them. The parties were divorced in September 1968 and custody of the six (6) minor children was awarded to the plaintiff-respondent with the usual reasonable visitation rights in defendant-appellant. The defendant-appellant was ordered to pay Forty Dollars (\$40.00) per month for each of the six (6) children as support money, and, in addition, was to pay to plaintiff the sum of Ninety-eight and 40/100 Dollars (\$98.40) per month to make the mortgage payment on the home of the parties that was to remain in the names of both parties until further disposition of the Court. The provision of the Decree read as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant is ordered to pay to the plaintiff as support money for the support and maintenance of the minor children of the party the sum of Forty (\$40.00) Dollars per month per each child, and, in addition, thereto to pay to the plaintiff the sum of Ninety-Eight and 40/100 Dollars (\$98.40) each month to enable the plaintiff to make the mortgage payment on the property of the parties.

There were other provisions in the Decree that are not material to this matter. In June of 1969, plaintiff cited defendant into Court for his failure to pay said mortgage payments alleging a delinquency of Seven hundred eighty-seven and 20/100 Dollars (\$787.20), which plaintiff had paid herself. In consideration of being relieved of the delinquency and future mortgage payments, defendant stipulated that plaintiff was to be awarded all of his right, title and interest in the home of the parties

and the Decree as modified in regard to support money then read as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant is to pay to the plaintiff as support money for the support and maintenance of the minor children of the parties the sum of Forty Dollars (\$40.00) per month for each child.

In September 1975, six and one-half years thereafter, plaintiff-respondent had served upon defendant and filed with the Court an Order to Show Cause in Re Modification of Decree (R-43), wherein she sought an increase in support money payments for the two (2) children remaining with her from the sum of Forty Dollars (\$40.00) per month for each of said children to One Hundred Dollars (\$100.00) for each child citing as her reasons therefore:

That plaintiff has remaining in her custody the minor children, LARAE RUSSELL and JOHN RUSSELL. That due to the increase in the cost of living and increase in the requirements of the said children Forty Dollars (\$40.00) is not sufficient to meet the support requirements of said children and to discharge defendant's obligation in regard to said children. (R-44).

The hearing on the Order to Show Cause and Petition came on for hearing before Honorable CALVIN GOULD on November 5, 1975. The plaintiff-respondent was sworn and testified in support of her petition; the defendant-appellant declined to offer testimony in opposition thereto. Based upon the testimony before the Court, the support money payments were increased from Forty Dollars (\$40.00) to Eighty Dollars (\$80.00) per month for the two (2) minor children, LARAE now sixteen and JOHN, eleven, these children being nine and three and one-half years of age when the Decree was entered (R-50).

ARGUMENT

POINT I

THE EVIDENCE SUPPORTS THE ORDER OF THE COURT.

The Petition to modify the Decree was based upon the following statute:

30-3-5, Utah Code Annotated, 1953 as amended.

When a Decree of Divorce is made, the Court may make such orders in relation to the children, property and parties and the maintenance of the parties and children as may be equitable. The Court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance or the distribution of the property as shall be reasonable and necessary.

Respondent has no argument with appellant as to the general statement of the law that there must be a pleading to support a modification and evidence in support of the pleading.

The pleading in the instant case is found in the Affidavit for Order to Show Cause in Re Modification of Decree (R-43) and in paragraph two thereof as follows:

That plaintiff has remaining in her custody the minor children, LARAE RUSSELL and JOHN RUSSELL. That due to the increase in the cost of living and increase in the requirements of the said children Forty Dollars (\$40.00) is not sufficient to meet the support requirements of said children and to discharge defendant's obligation in regard to said children.

The evidence in support of said pleadings is as follows:

Q. Mrs. Russell, one of the issues before the Court is that you are seeking to have the decree modified providing for \$100 a month for each child as support money rather than \$40.00 a month that you are now seeking?

A. Yes.

Q. And, Mrs. Russell, how old--what children are with you and how old are they?

A. I have two, LaRae is sixteen and John eleven.

Q. And where are you living?

A. On 1581 Canyon Road.

Q. Are you buying the home or renting the home?

A. Buying it.

Q. Now, you have been receiving \$40.00 a month from Mr. Russell for support of these children for sometime?

A. Yes, sir.

Q. For how long would that be?

A. Since the divorce.

Q. And when was that, was that about 19--

A. 1968, I think.

Q. '67 or '68?

A. Right.

Q. And this amount has not been increased in that time at all?

A. No, sir.

Q. Now, is \$40.00 sufficient to support these children?

A. No.

Q. Do you have a list of what your expenses are that you might read to the Court?

A. Yes.

Q. First of all, you are employed, aren't you?

A. Yes.

Q. And where are you employed?

A. At Carter's Supply.

Q. And what do you do there?

A. Secretary.

Q. And what are your earnings?

A. I earn \$2.85 per hour.

Q. All right. Do you work full time, forty hours a week?

A. Yes.

Q. Forty hours a week and five days a week?

A. Five days a week.

Q. Do you know what your net take home pay would be for the pay period?

A. You mean what I take home each time?

Q. Yes.

A. About \$200.00.

Q. Is that a month, or every two weeks?

A. Every two weeks.

Q. All right. What are the expenses that you have here in regard to the children?

A. Well, there is water, about \$20.00; the phone, of course, is \$10.00; gas runs anywhere from \$31.00 on up in the winter months for heat; lights are anywhere from \$25.00 to \$30.00. And my outgoing expenses for the home, rent, or the payment on my home is \$237.58. Of course, I have car insurance and life insurance.

Q. Have you included anything for the food?

A. No.

Q. What does it take for the two children per month.

A. For a month?

Q. Yes..

A. It is about \$40.00 every two weeks, so I would say \$80.00 a month or more.

Q. We are talking about the children alone?

A. Yeah.

Q. Do you have anything there for clothes?

A. No.

Q. For medical expenses?

A. No.

Q. And what amounts are you asking the Court award you for the support of the two children?

A. A hundred dollars per child.

POINT II

THE RESPONDENT SHOWED A CHANGE OF CONDITION JUSTIFYING THE MODIFICATION OF THE DECREE.

The testimony of the respondent in support of her petition to modify is as above quoted and there is no need to repeat it except to point out that respondent's expenditures exceed her income and these expenditures do not include clothing or medical expenses for the two (2) minor children of the parties.

The two (2) minor children under consideration are now sixteen and eleven years of age as against nine and three and one-half years of age when the Decree ordering Forty Dollars (\$40.00) per month for each of them as support was entered.

The increased expenses and the increase in age of the minor children was a change of circumstances justifying the modification of the Decree.

The Court could also take judicial notice that in seven or eight years the cost of living has increased and if Forty Dollars (\$40.00) per month as child support payment for each of said children was adequate in 1968 it was not adequate in November of 1975 or to say it another way, Forty Dollars (\$40.00) per month certainly was not sufficient to support a child of sixteen or eleven years of age in 1975.

The Courts will take judicial notice of the change in value of the dollar during a period of years and the material decline of the purchasing value of the dollar. For example, change in cost of living is so much a matter of common knowledge that the jury or court when fixing damages***may take judicial notice of such change. American Jurisprudence, 2d, Volume 29, Section 82, page 113.

In Mitchell vs. Mitchell, 527 Pacific, 2d, 1359 at page 1360 (Utah) which was an appeal based upon a modification of a Decree in regard to child support, the Court held as follows:

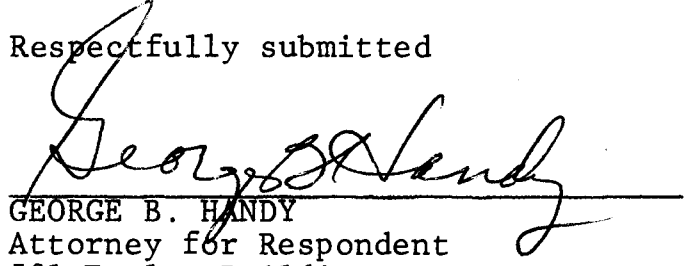
In accordance with this statute (30-3-5, Utah Code Annotated, 1953 as amended) this Court has held that a proceeding to modify a Divorce Decree is equitable and the same authority is conferred upon the trial court to make subsequent changes as respect to support and maintenance as it could have dealt with them originally*****However, in a divorce action the trial court has considerable latitude of discretion in adjusting financial and property interest and its actions are indulged with the presumption of validity. The burden is upon appellant to prove that the evidence clearly preponderates against the findings as made; or there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or a serious inequity has resulted as to manifest a clear abuse of discretion.

*****The determination of the trial court that there had been a substantial change of circumstances which justified the increase of support and maintenance is

presumed valid. This Court must assume that the trial court in evaluating the petition for modification for support considered the parties respective economic resources and determined what constituted the equitable share each should contribute to the household to maintain the family according to their station in life.

The evidence of the respondent in support of her petition to modify the Decree, to-wit: Her increased expenses, increased cost of living, the age increase of her children and their increased requirements fully showed changes of conditions warranting the Court in modifying the Decree. The fact that the defendant and appellant here chose not to offer evidence in opposition to respondent's petition should not stand him in good stead now.

Respectfully submitted



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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U. S. mail postage prepaid and addressed to the Attorney for the Appellant, PETE N. VLAHOS, ESQ., 2447 Kiesel Avenue, Ogden, Utah 84401, this _____ day of March 1976.

VICKI STROMBERG, Secretary